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CURRENT TOPICS.

A correspondent who is interested in the condition of the dockets of the appellate courts writes: "The great necessity at present in our system of appeals, both Federal and State, is the simplification of the record which goes before the appellate court; and none of the measures now in use appear to be adequate to this requirement. The judge who tried the case, and made the alleged error, is as apt to err again, either to assist his error, or from over-sensitiveness for the other side; or, more frequently, to compromise by ordering 'everything to be printed.' This burden to the Supreme Courts, by overwhelming them with unnecessary issues and analyses, is the principal cause of their obstruction and consequent delay. This can be rectified by making the clerk of the appellate court, or some other official, a censor of appeals. It should be his duty to supervise the manuscript transcript filed in his office, and abstract therefrom such portions as bear upon the exceptions, state this abstract in short form, and order the same to be published as the court record. Should he err in stating the points made, and the facts which bear upon them, he may be reached by *mandamus* from any of the justices of the Supreme Court. He might further be endowed with the power to declare as *res adjudicata* the points which appear to him to have been previously determined, under the same corrective remedial process. A further plan might be adopted, by making up the court record thus obtained, with only alphabetical descriptions of the plaintiff and defendant, stating their names as A, B, C, etc., so that nothing would go before the Supreme Court except these ciphers, free from any personal influence which the real names might carry. This is the plan observed in some of the Germanic Supreme Courts. Upon the decision of the Supreme Court as to the case made on ciphers, the clerk having the real names of the record, should, as a ministerial duty, issue the *remittitur* to the court below. By this plan the Supreme or Appellate Courts would only have to contend with abstract and new issues, and save themselves a great deal of unnecessary delay, trouble and investigation, and make their decrees of a uniform intelligence, and apace with the requirements of the age. Similar questions, arising from different appeals, might be classified; and issues on the criminal side of a class, on the civil side of tort, contract, or equity, and their subdivisions might be so arranged that the court may decide several cases at the same investigation, and all of them while their minds are engaged on the same subject."

We think our correspondent's suggestion for a censor of appeals is impracticable. The task of determining with precision what is the real point in controversy in a law suit, and of stating that point clearly and intelligibly, is second only to that of adjudicating the case, and is but little less difficult. It is true that after this undertaking had been fully and carefully performed, the work remaining for the judges would be comparatively much lighter and more agreeable in its nature. But the proposed censor would find urgent occasion for the mental acquirements of a chief-justice, united to the constitution of a dray-horse. His labors would be greater than that of any one of the judges, and far more responsible.

Nor can we give our approval to the plan of designating the parties only by ciphers. The removal of temptations surrounding an official position is usually, it is true, a desirable measure. But there are offices, so exalted in their nature, and demanding in their incumbents a purity so unimpeachable that protection from temptation assumes the likeness of suspicion; and a judge, like Cæsar's wife, must be above suspicion. Moreover, we do not believe that the readiness of the judiciary to yield to extraneous influence, either in the past or at present, would justify any such precaution. Indeed, considering all the attendant circumstances—the method of selection, the laborious character of the duties, and the pittance of compensation—we believe the American public are singularly fortunate in the character of their judiciary of all ranks above justices of the peace. We have many crabbed judges, some lazy ones, and, it must be admitted, a few stupid ones, but rarely or never a dishonest one. But, to

return, the simplification of the record, however it is to be accomplished, is, unquestionably, a most important element in the problem offered by the overcrowded condition of the dockets of our appellate courts. The most important result accomplished by the common counts under the old system of pleading, was the precision and certainty with which an issue was made. We are sometimes inclined to think that these well-established and well-defined rules were too hastily abandoned; and we know many lawyers, some, even, among the younger bar, who are of the same opinion. It seems to us, however, to attain the end in question, our most available means is the perfection of system of code pleading, and its gradual reduction to a scientific basis. As we approach this end, the issues in each case will become more sharply defined, and it will become practicable for the courts to exact greater precision in the preparation of bills of exceptions. Meanwhile, the fact that, notwithstanding the many imperfections of our undeveloped system of pleading, many records, almost all, indeed, of appealed cases, reach the eyes of the judges in an extremely clumsy shape, should not be lost sight of. It is a fault principally growing out of the carelessness, inaccuracy and sloth of counsel. It is far easier to draw a bill of exceptions, which is intended to operate somewhat in the nature of a drag-net, and include every possible error in the case, whether present in the mind of the counsel at the time he takes his appeal or not, than it is to select the really salient points of his case and state them simply, and nothing else; hence the practice so much in vogue. This matter is very much in control of the appellate judges themselves, who should compel the counsel to specify distinctly the grounds of contention; though undoubtedly legislation would be required in most of the States to give such regulation the weight of law, and provide appropriate pains and penalties in the shape of costs for its infraction.

INJURY TO PARENTAL FEELINGS.

In the absence of personal injury, it has been ruled that injury to the feelings of another, due to negligent conduct, can not be considered as a basis of damages or as a substantial ground of action. Thus it has been held that a verdict founded upon fright and mental suffering, caused by risk and peril, would, in the absence of personal injury, be contrary to law.[1] So it is said that mental pain and anxiety the law can not value, and does not pretend to redress, when the unlawful act complained of causes that alone.[2] If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the trains leaving the track, could maintain an action against the company.[3] A ruling in accordance with these authorities, and based upon them, has been recently made in a case where the source of injury was the blasting of rocks.[4] The result of this proceeding was to throw rocks upon the adjoining lands and buildings of the female plaintiff. It was held that she could not introduce testimony to show her mental anxiety in relation to her personal safety; that this was not an element of damage; and that the same was true of her anxiety in relation to the personal safety of her child while going to and returning from school. The court (per Virgin, J.) said: "We have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action; and the fact that no such case exists, and that no elementary writer asserts such a doctrine, is a strong argument against it. The question whether a fright of sufficient severity to cause a physical disease would support an action, was regarded as not being under consideration in the case at bar. In regard to the

[1] Canning v. Williamstown, 1 Cush. 451.

[2] Lynch v. Knight, 9 H. L. 577, 598. Again, in Johnson v. Wells, 6 Nev. 224 (3 Am. R. 245), after a very elaborate examination, it was held that pain of mind, aside and distinct from bodily suffering, can not be considered in an action against a common carrier of passengers.

[3] See an elaborate note by Mr. Wood in his edition of Mayne on Damages, 70, *et seq.*

[4] Wyman v. Leavitt, 71 Me. 227.

child, the objection was placed upon the broader ground, to be considered later, that as a general rule, there can be no recovery for injury to parental feelings. Where personal injury accompanies that inflicted upon the feelings, a different rule prevails. As a general proposition, damages are recoverable when they are the natural and reasonable result of the defendant's unlawful act,—that is, when they are such a consequence as in the ordinary course of things would flow from such an act. This is the broad rule covering all the elements of damages, some of which do not enter into every case. The rule, though correct as a general abstract statement, has its limitations in particular cases.[5] It may include insult and contumely, but they do not exist in every case of personal injury. Personal injury usually consists in pain inflicted both bodily and mentally. When bodily pain is caused, mental pain follows as a necessary consequence, especially when the former is so severe as to create apprehension and anxiety.[6] And not only the suffering experienced before the trial, but such as is reasonably certain to continue afterward, as the result of the injury, rightfully enters into the assessment of damages. In trespass for assault and battery, the jury may consider not only the mental suffering which accompanies and is a part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows.[7] Or for an assault alone, when maliciously done, though no actual personal injury be inflicted.[8] So, in various other torts to property alone, when the tortfeasor is actuated by wantonness or malice, or a wilful disregard of another's rights therein, injury to the feelings of the plaintiff, resulting from such conduct of the defendant, may properly be considered by the jury in fixing the amount of their verdict.[9]

Illustrations of the foregoing general principles are afforded by various cases. Thus in an action for an indecent assault on a female, her sufferings of mind have been held a fair subject for the consideration of the jury.[10] So, in the Federal courts, in an action for false imprisonment, "injury to the feelings" and "anxiety of mind" have been regarded as elements of the damages.[11] Again, in trespass for an assault and battery, the jury may consider the plaintiff's loss of peace of mind and happiness.[12] In libel and slander, mental suffering is an important element in the injury to be compensated.[13] But in an action of trespass on the close, brought by a tenant at will against an officer for illegally ejecting the tenant's wife and removing their furniture, an instruction to the jury to find "a reasonable compensation to their feelings," has been held erroneous.[14] So, in an action for forcible entry and detainer, damages sustained by reason of "great bodily and mental pain and anguish," were held too remote to be recovered.[15]

The connection of these principles and their applications and restrictions in specific instances, with injury to parental feelings, is most clearly seen in the case of injuries to children. Where the child himself sues, through his guardian or next friend, he may recover (upon the principles just stated) for pain and suffering he has undergone, both in body and in mind,[16] as well as for the cost of his cure,[17] and any permanent injury to his person.[18] But when suit for damages arising out of the same injury is brought by the par-

5 Wyman v. Leavitt, 71 Me. 227.

6 That the plaintiff is entitled to a pecuniary equivalent for the apprehensions and anguish of mind naturally excited by the risk and danger at the time of the injury, is held in Connecticut. Seger v. Barkhamsted, 22 Conn. 390; Masters v. Town of Warren, 27 Conn. 293; Lawrence v. Housatonic R. Co., 29 Com. 390. So, also, in California. Fairchild v. Cal. Stage Co., 13 Cal. 599. So, in Pennsylvania, Massachusetts, New Hampshire, Maryland, New York, Georgia and Indiana, it is held that in actions for a personal injury, mental as well as bodily pain enters into the damages to be compensated. Pennsylvania, etc Canal Co. v. Graham, 63 Pa. St. 290; Smith v. Halcomb, 99 Mass. 552; Holyoke v. Grand Trunk Railway, 48 N. H. 541; Stockton v. Frey, 4 Gill (Md.), 406; Mattreson v. N. Y. Cent. R. Co., 62 Barb. 364; Smith v. Overby, 30 Ga. 241; Cox v. Vanderkleed, 21 Ind. 164. See Sedgwick on Damages (6th ed.), 699, n 2.

7 Prentiss v. Shaw, 56 Me. 427; Wadsworth v. Treat, 43 Me. 163.

8 Goddard v. Grand Trunk Railway, 57 Me. 202; Beach v. Hancock, 27 N. H. 223; 2 Greene's Cr. R. 269.

9 Wyman v. Leavitt, *supra*.

10 Ford v. Jones, 62 Barb. 484.

11 McCall v. McDowell, Deady, 233.

12 Cox v. Vanderkleed, 21 Ind. 164.

13 Swift v. Dickermann, 31 Conn. 285; Miller v. Roy, 10 La. Ann. 231; Duport v. Abadie, 23 La. Ann. 280.

14 Smith v. Grant, 56 Me. 255.

15 Anderson v. Taylor, 56 Cal. 131.

16 Shearman & Redf. Negl., sec. 608.

17 But see Collin v. Le Fevre, 1 Fost. & Fin. 436.

18 See Menges v. Muncy Creek Township, 12 Reporter, 345.

ent, a different standard of damages prevails. There is then recovery for loss of service,[19] and for the expenses of nursing and healing the child.[20] But the damages can not embrace compensation for the child's sufferings, whether physical or mental, or for the parent's sympathetic sufferings, lacerated feelings or disappointed hopes.[21] The individual suffering of the immediate subject of the wrongful act can not be taken into account in the assignment of damages;[22] for the child could sue for the wrong personal to himself.[23] The parent's mental anguish, as a reaction from the injury, is also to be excluded. Nor is the rule different where the parent sues under statutes which provide that in all cases of personal injury, such damages may be given as under all the circumstances of the case may be just.[24]

Where death results from the injury, the recovery of damages by the parent (where the statute authorizes him to sue either directly or in the capacity of personal representative), is still more restricted. Neither the injuries personal to the deceased, nor the mental anguish or distress of the parent, or nearest survivor, are to be considered as elements of damage. Hence, where a mother brings action against a railroad company for damages for the loss of the life of her minor son, killed by an engine of the defendants, the elements of damage considered by the jury can not extend to "such other circumstances as have injuriously affected the plaintiff in person, in peace of mind, and in happiness."[25]

Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, nor the anguish of mind inflicted upon the parent by such a calamity, are to be taken into account, even though the statute authorizes the jury to award such damages as they deem fair and just.[26] The wrong personal to the decedent is considered to have died with him. As for the mental distress of the parent, unless, possibly, when the shock results in illness,[27] and such consequential damages are specially alleged, no damages can be awarded to the parent by reason of his injured feelings as parent. Damages for the mental suffering of one person on account of physical injury to another, are too remote to be given by court or jury.[28] Hence, it may be asserted that generally a father can recover no damages for injury to his parental feelings.[29] This rule, like most others, has its exceptions, among which are seduction,[30] and forcible abduction of a child;[31] in both of which, though based upon the predicate of a loss of service, parental feelings may be considered by the jury; and *trespass quare clausum* for disinterring and removing, in wilful disregard of the father's rights, the remains of the deceased child.[32]

Of the three exceptions just mentioned, the first one named presents points of peculiar interest. Although the action by a parent for the seduction of his daughter has its technical foundation in the loss of his daughter's services, it is well settled that proof of the relation of master and servant, and of the loss of service by means of the wrongful act of the defendant, has relation only to the form of the remedy, and that the action being sustained in point of form by the introduction of these technical elements, the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury.[33] So, in the very recent case of Lavery v. Crooke,[34] it was said: "It is true there are but few reported cases where the jury were directly charged, as here, that they might not only compensate the plaintiff, but punish the

[19] Addison on Torts, p. 902; Travers v. Eighth Ave. R. Co., 3 Keyes, 497.

[20] Dennis v. Clark, 2 Cush. 347; Sykes v. Lawlor, 49 Cal. 236; Ihl v. Forty-second Street R. Co., 47 N. Y. 317; McCarthy v. Guild, 12 Met. 291. But as to limit, see Karr v. Parks, 44 Cal. 46.

[21] Thompson Negl., 1289, and cases cited.

[22] Long v. Morrison, 14 Ind. 360.

[23] Penn. R. Co. v. Kelly, 31 Pa. St. 372.

[24] Durkee v. Central Pacific R. Co., 56 Cal. 388.

[25] Ohio, etc. R. Co. v. Tindall, 13 Ind. 386.

[26] Oldfield v. New York, etc. R. Co., 14 N. Y. 318; Quin v. Moore, 15 N. Y. 432.

[27] Ford v. Monroe, 20 Wend. 368.

[28] Covington Street R. Co. v. Packer, 9 Bush. 455.

[29] Flemington v. Smithers, 2 Car. & P. 292; Black v. Carrollton, 10 La. Ann. 33; Shearm. & Redf. on Neg. (2d ed.), sec. 608, *a*.

[30] 2 Greenl. on Ev., sec. 579; Phillips v. Hoyle, 4 Gray, 568.

[31] Stowe v. Heywood, 7 Allen, 118.

[32] Meagher v. Driscoll, 97 Mass. 281. See Wyman v. Leavitt, 71 Me. 227.

[33] Phelin v. Kenderdine, 20 Pa. St. 354.

[34] 9 N. W. Rep. 599 (Supreme Court of Wisconsin, June 4, 1881).

defendant according to the aggravation of the offense; but we are to remember that courts have almost uniformly treated the case rather as an anomaly. While the loss of service is the gist of the action, and essential to maintain it, yet we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages. On the contrary, the feelings of the parent, the dishonor of himself and family, and the example to his other children, have been regarded by all courts as the important elements making up substantial damages in connection with the slight pecuniary loss." The cases reviewed in the last case present confirmatory illustrations of the positions taken. Thus Bedford v. McKnowl,[35] was an action by a mother for the loss of services of her daughter, by reason of her seduction. It was tried before Lord Eldon just before his appointment as Lord Chancellor, and, among other things, he said: "In such case I am of opinion that the jury may take into their consideration all that she [the mother] can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children whose morals may be corrupted by her example." In Andrews v. Askey,[36] where action had been brought by a widow for the seduction of her daughter, Tindal, C. J., said to the jury: "You are not confined to the consideration of the mere loss of service, but may give some damages for the distress and anxiety of mind which the mother has felt." In a note to the same case, reference is made to a couple of early cases where the jury were directed to regard not only the loss of service, but the wounded feelings of the parent,[37] and the loss which the father sustained by being deprived of the society and comfort of his child, and by the dishonor which he receives. So in Lipe v. Eisenlord,[38] where the daughter was twenty-nine years of age, and the father obtained a verdict of $1,000. The judgment thereon was affirmed at general term, and in the Court of Appeals. In the final tribunal it was held that the plaintiff is not limited to mere compensatory damages, but may recover exemplary damages when he is so connected with the party as to be capable of receiving injury through her dishonor. Hence, the amount recoverable in an action for seduction, by the parent, or one *in loco parentis*, is dependent upon the pecuniary circumstances and position in society of both plaintiff and defendant, the reputation for chastity of the seduced female, before her seduction, not afterward, and upon all the circumstances surrounding the seduction.[39]

This is a considerable extension of the original basis of damages, and embraces elements which could not be considered unless the injury to the parental feelings were a feature of the recovery in the action.

A. J. Donner.

San Francisco, Cal.

[35] 3 Esp., 17.
[36] 8 C. & P., 7.
[37] On this point, see Knight v. Wilcox, 18 Barb. 212, and Bagsley v. Decker, 44 Barb. 577.
[38] 32 N. Y., 229.
[39] 5 Wait's Act. & Def., 668.

SUITS BROUGHT ON THE SAME CAUSE OF ACTION IN DIFFERENT STATES; AND ACTIONS ON JUDGMENTS FROM ANOTHER STATE.

Questions connected with this subject have been occasionally before the American courts, and have become interesting on account of the different views expressed; yet the manner of proceeding, as to whether a suit should be brought on a judgment obtained on the prior action, or a suit in the same cause of action in other States, has been differently settled by the highest authority.

It was decided by the Supreme Court of the United States: 1. "The rule at law, that the pendency of a former action between the same parties for the same cause, is pleadable in abatement to a second action, provided the actions be in courts of the same State, holds in equity." 2. "The plea of a former suit pending in equity for the same cause of action in a foreign jurisdiction will not abate an action at law in a domestic tribunal, or authorize an injunction against prosecuting such action." [1]

[1] Insurance Co. v. Brane, 96 U. S. 588.

The mere pendency of a suit in a court of the United States can not be pleaded in abatement, or in bar to a suit for the same cause in a State court.[2] Judge Cooper[3] says: "The pendency of a suit at law in another State for the identical object and purpose, is no defense to a bill in equity; and *a fortiori*, if the suit be by the defendant against the plaintiff in equity."[4] And in Tennessee, an attachment bill by a creditor may be prosecuted, although the plaintiff is at the same time prosecuting a suit in the chancery court of another State for the purpose of subjecting property of the debtor to the satisfaction of the same debt.[5]

It has been held that the pendency of a suit in a State court of another State, in which property enough to satisfy the demand has been attached, is ground for the abatement of a suit in the Circuit Court of the United States.[6] But it has been held, that the defense was only available in the last suit, not in the first.[7]

Pendency of a Prior Suit.—The pendency of a prior suit in a State court is not a bar to a suit in a Circuit Court of the United States, or in the Supreme Court of the District of Columbia, by the same plaintiff against the same defendant, for the same cause of action.[8]

In the above case, the court remarked: "It is insisted by the defendant in error that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in the circuit court or in court below, even though the two suits are for the same cause of action; and the court here concurs in that proposition." Repeated attempts to maintain the prerogative of that proposition have been made, and a few adjudications sustain it, the court remarking, "but the great weight of authority is the other way."[9] The above cases are sustained by the decision in the case of Insurance Company v. Brane,[10] decided in 1877.

At law, the pendency of a former action between the same parties, for the same cause, is pleadable in abatement to a second action. But the former action must be in a domestic court.[11] In equity the same rule prevails.[12] A very important point is decided in the case of Insurance Company v. Brane. The plea of a judgment, or final decree, obtained in a former action in the same cause, and same parties, in different States, would be sustained. The pendency of a former action, is not a sufficient plea. The obtaining of a judgment, or decree, in another State, is a sufficient defense to a suit on the same cause, and same parties. The suit in another State must be on a judgment obtained not on the same subject-matter, or cause of action, on which the judgment was obtained.

The history and decision of the case of Insurance Company v. Branb,[13] explains and sustains this point. Suit had been brought by bill in equity in a State court in New York; on the same cause of action pending suit in New York, two suits were instituted in the Circuit Court of the United States for the District of Maryland. A bill was filed in the court in which the second action was brought, asked that the parties be enjoined from further proceedihgs in the two actions commenced in said court, on the ground of the pendency of suit in New York. The court below refused the injunction. Mr. Justice Strong, delivering the opinion of the Supreme Court of the United States, said: "If, then, a bill in equity, pending in a foreign jurisdiction, has no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement; if, still more, it has no effect when pleaded to another bill in equity, as the authorities show,

2 1 Daniel's Ch. Pl. & Pr. (5th ed.), 633, note 5, citing Mitchell v. Bunce, 2 Paige, 606; Salmon v. Wooton, 9 Dana, 423; Hatch v. Spofford, 22 Conn. 495, overruling Hart v. Granger, 1 Conn. 154.

3 Notes to 1 Daniel's Ch. Pl. & Pr.. 633.

4 Citing Fulton v. Golden, 10 C. E. Green, 353.

5 Lockwood v. Nye, 2 Swan. 515.

6 Lawrence v. Remington, 6 Biss. 44. See, also, Allen v. Watt, 69 Ill. 655; Grider v. Apperson, 32 Ark. 332; Cole v. Fliteraft, 47 Md. 312.

7 Ratrer v. Ratrer, 2 Abb. N. Cas., 461.

8 Stanton v. Embry, 93 U. S. 548.

9 Citing, Browne v. Joy, 9 Johns. 221; Hatch v. Spofford, 22 Conn. 497; Maul v. Murray, 7 Tenn. 466; Imlay v. Ellefsen, 2 East, 457; Colt v. Partridge, 7 Met. 572; Smith v. Lathrop, 44 Pa. St. 328; Cox v. Mitchell, 7 C. B. (N. S.) 55; Wood v. Lake, 13 Wis. 91; Wadleigh v. Veasie, 3 Sumn. 167; Loring v. Marsh, 2 Cliff. 322; White v. Whitman, 1 Curt. 494; Salmon v. Wooten, 9 Dana, 422; Yelverton v. Conant, 18 N. H. 124; Walsh v. Durkin, 12 Johns. 99; Davis v. Morton, 4 Bush. 444.

10 *Supra.*

11 Buckner v. Finlay, 2 Pet. 586; Browne v. Joy, 9 Johns. 221; Smith v. Lathrop, 44 Pa. St. 326.

12 Story's Eq. Pl., sec. 741; Foster v. Vassall, 3 Ark. 587; Dillon v. Alvoris, 4 Ves. 357; Hatch v. Spofford, 22 Conn. 485.

13 *Supra.*

it is impossible to see how it can be a basis for an injunction against prosecuting a suit at law. It follows that the refusal of an injunction by the circuit court was not erroneous." This explains the difference in bringing two actions in different States, instead of an action on a judgment or decree, the court having previously remarked: "Hence, if there were a final decree in th New York case against the complainant here, the present appellee would necessarily fail in the action he has brought in Maryland. That decree would be pleadable in bar to his suit, and the complainant would have complete protection at law." In conclusion, the court final decree be made by the Supreme Court, said: "As we have already remarked, if a it will, if pleaded, be a bar in the Maryland courts; and, if a judgment be rendered in the latter, the New York Court, having jurisdiction of the parties, will be able to determine to whom, in equity, the judgment belongs."

We are sustained by precedent and textwriter, in concluding that pending the action in one State, suit can be brought in another State on the same cause; but if judgment has been obtained on the first action, then, if necessary, suit must be brought on the judgment; for, if brought on the same cause of action, though in a different State, a prior judgment or decree could be pleaded without further defense or proof beyond the record; while, if suit be brought on the judgment or decree, the filing of which will be sufficient, subject only to such defense, of jurisdiction of the former court, or fraud, as is well known to the American jurist as settled by the Constitution of the United States and the tatutes and practice of State and Federal courts.

It has been held that a defendant, in an action on a judgment of another State, may plead that he was not served with process, and that the attorney who entered an appearance and filed an answer for him, had no authority to do so.[14] This does not conflict with a decision that in an action on a judgment of a court of another State of general jurisdiction, it is not necessary to aver in the declaration that the court had acquired jurisdiction of the person of the defendant.[15]

[14] Arnott v. Webb, 1 Dill, 362.
[15] Tenney v. Townsend, 9 Bl C. C. 274.

In relation to the question of fraud being pleaded to a judgment sued on in another State, the law is this: If jurisdiction has been obtained by fraudulent means, for example by inducing, then the party to come within the jurisdiction of the court to serve process on him.[16] But a plea that the judgment was obtained by fraud, duress, covin and misrepresentation is bad.[17] A plea of fraud in obtaining a judgment sued upon, can not be demurred to generally, because not showing the particulars of the fraud set up. Going to a matter of form, the demurrer should be special.

Subject to the qualification that it is open to inquiry as to the jurisdiction of the court which gave it, and as to notice to the defendant, the judgment of a State court, not reversed by a Superior Court having jurisdiction, nor set aside by a direct proceeding in chancery, is conclusive in the courts of all the other States where the subject-matter of controversy is the same.[18] The trial on the merits in the cause wherein the judgment is rendered, is conclusive in the courts of other States, if there was jurisdiction in the court rendering the judgment.[19] The court of another State will not go behind such judgment, except on the grounds stated above.[20] There are some rulings to the contrary. Satd Marshall, C. J., Hampton v. McConnell:[21] "The judgment of a State court should have the same credit, validity and effect in every other court in the United States which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none other could be pleaded in any other court in the United States." Dillon, J., in Harshey v. Blackman:[22] "A judgment debtor, in an action against him on the judgment of another State, may successfully defend by showing that the attorney who en-

[16] Bigelow on Fraud, 171; Dunlap v. Cody, 31 Iowa, 260.
[17] Randolph v. King, 2 Bond. 104.
[18] Christmas v. Russell, 5 Wall. 290; Hockaday v. Skeggs, 18 La. Ann. 681.
[19] Rorer on Inter-State Law, 105.
[20] Duval v. Fearson, 18 Md. 502; Rankin v. Goddard, 54 Me. 28; Roberts v. Hodges, 1 C. E. Green (N. J.), 299.
[21] 3 Wheat. 234. See also Rogers v. Gwinn, 21 Iowa, 58; Davis v. Headley, 22 N. J. Eq. 115; Ward v. Quinlivin, 57 Mo. 425; Mills v. Durgee, 7 Cr. 481.
[22] 20 Iowa, 161. See, also, Taylor v. Carpenter, 2 Woodb. & M. 1; Westerwelt v. Lewis, 2 McL. 511.

tered an appearance f ·him had no authority to do so." And the Supreme Court of the United States has recently held: "Want of jurisdiction may be shown either as to the subject-matter or the person, or in proceedings *in rem*, as to the thing."[23] This last cited case (Mr. Justice Bradley delivering the opinion of the court), is the ablest and most learned discussion on the subject it treated yet offered by any American jurist, and is of especial value as to proceedings *in rem* on this subject. We refer the bench and bar to it with great pleasure, without attempting at this time to review it.

The latest decision on this subject held: "A court will acquire jurisdiction of the person in a suit originally commenced by an attachment *in rem*, if the party against whom the claim is set up voluntarily submits himself to the jurisdiction, demurs, pleads and goes to trial on issues made."[24] The court in this case also sustained the ruling in Mills v. Dwyer,[25] that *nil debet* is not a good plea to an action upon a judgment in another State. And also the ruling in Christmas v. Russell,[26] that fraud could not be pleaded to an action in one State upon a judgment in another.[27]

WM. ARCHER COCKE.

Florida.

[23] Thompson v. Whitman, 18 Wall. 457.
[24] Manwell v. Stewart, 22 Wall. 77.
[25] *Supra.*
[26] *Supra.*
[27] On this last point, Rorer on Inter-State Law, 108, takes a different view, and cites in support thereof, Dunlap v. Cody, 31 Iowa, 260; Ilsley v. Nichols, 2 Pick. 270.

FEDERAL COURT — CONSTRUCTION OF STATE STATUTES — MATERIALITY OF ERROR.

MOORES v. CITIZENS' NATIONAL BANK.

Supreme Court of the United States, October Term 1881.

1. The construction given by the Supreme Court of a State to a statute of limitations of the State will be followed by this court in a case decided the other way in the circuit court before the decision of the State court.

2. The erroneous sustaining a demurrer to a replication to one of several defenses in the answer, requires the reversal of a final judgment for the defendant, which is not clearly shown by the record to have proceeded upon other grounds.

In error to the Circuit Court of the United States for the Southern District of Ohio.

The action was brought by Caroline A. Moores against the Citizens' National Bank of Piqua, in March, 1873. The amended petition, filed on the 11th of February, 1874, and subsequently amended by leave of the court in some particulars, after a motion of the defendant to require the plaintiff to make it more specific, alleging that the defendant was a banking corporation duly incorporated under the laws of the United States in 1864, with a capital stock of one thousand shares of one hundred dollars each, of which the whole was paid in, and certificates issued to the stockholders; that on the 15th of July, 1867, G. Volney Dorsey, was president and Robert B. Moores was cashier, and they were charged with the keeping of its transfer books and the issue of certificates of stock; that on that day Robert B. Moores represented himself to the plaintiff, and appeared on the books of the bank, to be the owner of more than ninety-one shares, and she purchased of him ninety-one shares, and paid him therefor the sum of $9,100 in money, and he, as cashier and stockholder, falsely and fraudulently represented to her that he had, in consideration of such purchase and payment by her, assigned and transferred the ninety-one shares to her on the books of the bank, and thereupon Dorsey as president, and Robert B. Moores as cashier, signed and issued to her a certificate therefor in the usual form; that the plaintiff believed and relied upon the representations of Robert B. Moores, as cashier and stockholder, that the stock had been duly transferred by him to her on the books of the bank, and that the certificate was duly issued and was valid; that she was recognized as a stockholder for that amount of stock until on or after the first of January, 1873, when she first learned that the defendant disputed the validity of the certificate, denied that any transfer had been made to her upon its books, and refused to recognize her as a stockholder; that after the issue of the certificate to her the defendant fraudulently permitted and procured Robert B. Moores to make on its books transfers of all the stock owned by him, or standing in his name, to Dorsey, its president, for its benefit, and refused, and still refuses, to recognize the plaintiff as owner of the stock, or to recognize the validity of the certificate; that the facts that no transfer had been made to the plaintiff on the books of the bank at the time of the issue and delivery of the certificate to her, that the certificate was not authorized by the bank or recognized as valid, and that the stock standing in the name of Robert B. Moores had been transferred on the books to its president, were fraudulently concealed by the defendant, through its cashier, Robert B. Moores, and she was aware of no circumstances calling for inquiry on her part until after the first of January, 1873; that, by reason of the fraudulent conduct and acts aforesaid of the defendant, the certificate was invalid and worthless in her hands,

she had lost the $9,100 paid by her therefor; and that the defendant had been requested by the plaintiff to repay or reimburse that sum to her, or to recognize the validity of the certificate, and had refused so to do.

The defendant filed an answer, setting up three grounds of defense: 1st. Averring that the plaintiff's alleged cause of action did not accrue within four years next preceding the commencement of the action; and denying that the plaintiff was ignorant of the facts set forth in her petition, if they existed, or of facts which called upon her to inquire as to the validity of the certificate, until the 1st of January, 1873, or any other date after the 15th of July, 1867. 2d. Averring that, pursuant to an agreement made by the plaintiff and her husband with Robert B. Moores and William B. Moores on the 15th of July, 1867, which the defendant had no knowledge of, interest in, or connection with, the sum of $9,100 had been repaid to the plaintiff by William for the paper purporting to be a certificate of stock, and Robert had thereby become entitled to take up the same. 3d. Averring that the paper averring to be a certificate of stock was executed and delivered by Robert to the plaintiff, in violation of his duty, and without the knowledge or consent of Dorsey or any other officer of the defendant; that, according to the defendant's rules and usages, no one could procure a certificate of stock without the contemporaneous surrender of a certificate for an equal amount for cancellation; and that before the 15th of July, 1867, all the shares previously held by Robert had been transferred by him, and on the books of the bank, to other persons.

The plaintiff replied, alleging, as to the first ground of defense, 1st, that at and before the 15th of July, 1867, and ever since, she was a married woman; 2d, that the cause of action did accrue within four years; and, as to the second ground of defense, denying the agreement and payment therein alleged; and demurred to the third ground of defense. And the defendant demurred to both the replies, for the reason that they did not constitute good replies to the first ground of defense.

The court ordered that the defendant's demurrer to the plaintiff's first reply to the first ground of defense be sustained, to which the plaintiff excepted: ordered that the defendant's demurrer to the plaintiff's second reply to the first ground of defense be overruled, to which the defendant excepted; ordered that the plaintiff's demurrer to the third ground of defense be sustained, to which the defendant also excepted; and gave the parties leave to plead within thirty days, which did not appear to have been availed of.

The defendant afterwards, by leave of court, in lieu of the third ground of defense, filed an amendment of the answer, denying that Dorsey had any connection with the transaction alleged in the petition, or that he issued to the plaintiff the certificate therein set forth, or that Robert B. Moores, as its cashier, or in his official capacity, issued the certificate to her, or that he held any certificate of stock in the bank on the 15th of July, 1867, or at any time thereafter; alleging that, according to rules and usages, no one was entitled to receive a certificate of ownership of shares without the surrender of a certificate of corresponding amount for cancellation, all of which was well known to the plaintiff; and denying generally all allegations of fraud or negligence contained in the petition. And it was ordered by the court that "the default herein" (of which there was no previous mention in the record) be set aside, and the plaintiff have leave to reply; and she did reply, joining issue on the denials and denying the allegations of the amended answer.

The record stated that the parties afterwards, by their attorneys, filed a written stipulation waiving a jury, and "submitted the case to the court upon the issue joined. On consideration whereof the court find the issues to be in favor of the defendant, to which finding the plaintiff by her attorneys excepts." The bill of exceptions presented by the plaintiff, and allowed by the judge presiding at the trial, stated that the case was submitted to the court upon all the evidence (which was in writing and annexed to the bill), and "thereupon the court found for the defendant, to which the plaintiff excepted."

The Civil Code of Ohio, of 1853, in the chapter concerning the limitation of personal actions, provided that the following actions should be brought within four years next after the cause of action shall have accrued, namely, "an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated;" and "an action for relief on the ground of fraud; the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud;" secs. 12, 15; and that, "If a person entitled to bring any action mentioned in this chapter, except for a penalty or forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter, after such disability shall be removed;" sec. 19; and, in the chapter concerning parties to civil actions, provided that "where a married woman is a party, her husband must be joined with her; except, when the action concerns her separate property, she may sue without her husband, by her next friend; when the action is between herself and her husband, she may sue or be sued alone; but in every such action other than for a divorce or alimony, she shall prosecute and defend by her next friend;" sec. 28. 2 Rev. Stat. of Ohio (Swan & Critchfield's ed.), 947, 949, 953. The section last cited has been amended by the act of April 15, 1870, sec. 1, by providing that in actions concerning her separate property she may sue and be sued alone, and shall in no case be required to promote or defend by her next friend. 67 Ohio Laws, 111.

Mr. Justice GRAY delivered the opinion of the court:

The principal embarrassment in this case arises from the difficulty of ascertaining from the prolix and obscure record what was actually decided in the court below. The decision of that court sustaining the demurrer to the plaintiff's first reply to the first ground of defense was based upon the position that the exception in the statute of limitations of Ohio in favor of a married woman was repealed by the statute of 1870, by which it was enacted that a married woman might sue alone in actions concerning her separate property. That decision was in accordance with an opinion of the majority of the Superior Court of Cincinnati, in Ong v. Sumner, 1 Cincinnati Superior Court, 424, which appears to have been the only decision upon the question in the courts of Ohio at the time of the trial of the present case in the circuit court. But in Lawrence Railroad v. Cobb, 25 Ohio State, 94, the Supreme Court of Ohio has since adjudged that, even if the statute of 1870 withdrew the protection of coverture (a point which it did not decide), yet the action of a married woman was not barred until four years after the passage of this statute; and the construction thus given to the statute by the highest court of the State is binding upon the Federal courts Tioga Railroad v. Blossburg, etc. Railroad, 20 Wall. 137; Kibbe v. Ditto, 93 U. S. 674; Fairfield v. Gallatin County, 100 U. S. 47.

It follows that the order sustaining the demurrer to the plaintiff's first reply was erroneous, and that the judgment below in favor of the defendant must be reversed, unless it clearly appears that the plaintiff was not prejudiced by the error. Deery v. Cray, 5 Wall. 795; Knox County Bank v. Lloyd, 18 Ohio, 353.

To the first action of defense stated in the answer, namely, that the cause of action did not accrue within four years, the plaintiff had made two replies: the first, in the nature of confession and avoidance, that she was a married woman; the second, in the nature of a traverse, that the action did accrue within four years. This allegation of fact in the second reply can not affect the issue of law raised by the defendant's demurrer to the first reply. After that demurrer had been sustained, the case, as was assumed and contended by the learned counsel for the defendant at the argument, presented three issues: 1st. Whether the cause of action accrued within four years. 2d. Whether there had been a payment, as alleged in the second ground of defense. 3d. Upon the third ground of defense, which included a general denial of all the material allegations in the petition.

A verdict of a jury, or, where a trial by jury is waived, a finding by the court, upon any one of these issues, would be sufficient to sustain a general finding for the defendant, and would render the other issues of fact immaterial. The bill of exceptions merely states generally that "the court found for the defendant;" and the statement in the record, that, under a submission, "upon the issue joined," the court found "the issues" to be in favor of the defendant, is too ambiguous to enlarge the effect of the general finding as stated in the bill of exceptions.

The sustaining of the demurrer to the plaintiff's first reply deprived her of the right to insist upon the ground of action, which was open under the petition, that the defendant, more than four years before the action was brought, permitted and procured the transfer upon its books to other persons of shares of which the plaintiff held the certificate (Bank v. Lanier, 11 Wall. 369; Telegraph Co. v. Davenport, 97 U. S. 369); and limited her, so far as regarded the first ground of defense, to proof of a cause of action accruing within the four years. The general finding in favor of the defendant may have proceeded solely upon that ground of defense, without touching the second and third rounds.

The defendant, therefore, fails to show that the error in sustaining its demurrer did not prejudice the plaintiff, and, consequently, the judgment must be reversed and a new trial ordered.

Mr. Justice MATTHEWS did not sit in this case.

NATIONAL BANKS—SHAREHOLDER'S LIABILITY — MULTIPLICATION OF SUITS — EQUITY.

HARVEY v. LORD.

United States Circuit Court, Northern District of Illinois.

Where a creditor's bill was pending against a National bank, and an act of Congress was passed, *pendente lite*, authorizing the court to enforce the stockholder's liability for corporate debts in such proceedings, and a supplemental bill making the stockholders parties was filed for the purpose of enforcing such liability: *Held*, That the individual liability of the shareholders could be enforced in such proceedings in equity; and 2. that the pendency of such proceedings will operate as a bar to an action at law to enforce the same individual liability.

BLODGETT, J., delivered the opinion of the court:

This is a suit at law brought by Harvey as receiver of the Manufacturers' National Bank of Chicago against Thomas Lord, to enforce his liability as a stockholder of the bank. To this suit the defendant has a plea in abatement that, on the 3d day of February, 1875, one James Irons, who was then a creditor of the Manufacturers' National Bank, filed in this court a bill to enforce payment of his judgment; that such proceedings were taken in that case; that Joel D. Harvey was appointed receiver of all the property and effects of the bank, and entered upon the discharge of the duties of his office and took possession of the property of the bank; that after-

wards, on the 5th of October, 1876, an amended bill was filed in said cause, to which all the stockholders of the bank were made parties, by which the complainant sought to enforce the liability of the stockholders for the purpose of discharging the indebtedness of the bank; that the defendant in this suit, as one of the stockholders of the bank, was made a party to the Irons suit; that said suit in chancery is still pending and proceeding, and this suit at law is brought for the same cause, and to enforce the same liability which the creditor's bill by Irons seeks to enforce, and, therefore, he prays an abatement of this suit. At the time the original bill was filed by Irons, there was no express provision in the national banking law for the enforcement of a stockholder's liability by the machinery of a creditor's bill; and the Supreme Court, in Kennedy v. Gibson, 8 Wall. 498, has decided that the stockholder's liability could only be enforced through a receiver appointed by the comptroller of the currency. But on June 30, 1876, Congress passed an act amendatory of the national banking law, which provided by the second section as follows: "When any national banking association shall have gone into liquidation under the provisions of section 5220 of said statute, the individual liability of the shareholders, provided for by section 5151 of the said statute, may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof in any court of the United States having original jurisdiction in equity for the district in which said association may be located or established."

The amended and supplemental bill was filed by Irons after the passage of this amendment, and was intended to bring all the stockholders of the Manufacturers' National Bank before the court, and to enforce their liability through the agency of the receiver appointed by the court in that case. This defendant is a party to and has answered in that suit. About a year ago, and long after the amended and supplemental bill of Irons was filed, the comptroller of the currency appointed a receiver to wind up the affairs of this bank, and named the same person whom this court had appointed in the Irons suit; and under that appointment, acting under the advice of counsel, he has brought suits at law against the stockholders. The only question is whether the suit which had been brought by Irons, and which had been amended to adapt it to the provisions of the act of June 30, 1876, can be pleaded in abatement to this suit at law which has been instituted by the same receiver under the authority or sanction of the comptroller. After the filing of the original Irons' bill, the powers of the court under such a bill were materially enlarged by the act of Congress just quoted. That bill was pending when this law took effect, and Irons undoubtedly had the right by amendment to make a case which would enable the court to administer these enlarged powers with which it had been clothed '*pendente lite*." Story's Eq. Plead. 336; Mix v. Beach, 46 Ill. 311. It seems to me that there is no room to doubt that this stockholder's liability can be completely enforced in the Irons' case; and if it can, then I see no reason why the general rule that a debtor shall not be vexed by two suits in the same jurisdiction for the same cause of action is clearly applicable.

I may also say in the same connection that I have great doubts whether the comptroller had any authority to appoint a receiver after the court had appointed a receiver, and taken steps under a creditor's bill to enforce the stockholder's liability. The statute gives the comptroller authority to appoint a receiver in certain cases, and then in another section of the same statute provides expressly, where a bank has gone into voluntary liquidation, and is in process of winding up its affairs, any creditor may enforce the liability of the stockholder by a creditor's bill; and if the comptroller had not acted and appointed a receiver for the purpose of enforcing the stockholder's liability, I have no doubt but what the action of the court supersedes the action of the comptroller in the premises, and gives the authority solely to the court to enforce the individual liability of the stockholders.

It can not, I think, be maintained that Congress intended, by the act of June 30, 1876, to leave the comptroller any authority over the assets of a National bank, which had gone into voluntary liquidation under section 5220, after a court of competent jurisdiction had, under a creditor's bill, appointed a receiver and taken possession of the assets, and initiated proceedings to enforce the liability of stockholders, because that would bring about a conflict between the officers of the court and those of the comptroller. The grant of power to enforce the liability of stockholders is plenary and ample, and I see no need for any function of the comptroller, when the affairs of the bank are once properly in the hands of the court.

The demurrer to the plea in abatement is overruled, and judgment rendered on the demurrer.

CHATTEL MORTGAGE — POSSESSION OF MORTGAGEE—NOTICE—RECORD.

WILSON v. MILLIGAN.

Supreme Court of Missouri, October Term, 1881.

A mortgagee of personal property, who has had both the time and opportunity to file his mortgage for record, and postpones doing so to a future time, can not be said to have filed the same for record within a reasonable time; and in such a case, where the possession of the propert has remained with the mortgagee, the mortgage will not be enforced against

a creditor, although the latter purchased the property with actual notice of the existence of the mortgage.

C. A. Winslow, *Boyd & Vaughan*, for appellant; *H. E. Howell*, for respondent.

NORTON, J., delivered the opinion of the court:

This case is here on the appeal of defendant from a judgment rendered in the Greene County circuit court, and involves as the principal question whether an unrecorded mortgage of personal property, where the possession of the property remains with the mortgagor, can be enforced against a creditor who purchased the property with actual notice of the existence of the mortgage. An affirmative answer to this question affirms the judgment, and a negative answer reverses it. A negative answer was returned to the question by this court in the case of Bryson v. Penix, 18 Mo. 13, where it was held that the purchaser of personal property from a mortgagor in possession will hold against a prior unrecorded mortgage, even though he had notice of it.

This principle was affirmed in the case of Bevans v. Bolton, 31 Mo. 437. Judge Scott, who delivered the opinion in the case of Bryson v. Penix, *supra*, observed, "that the statute prescribes no time within which such mortgages shall be recorded, and that under such circumstances a party must have a reasonable time for that purpose, which is to be determined by the circumstances of each case; and when a deed is recorded within a reasonable time, it has relation back to the time of execution." Conceding this dictum to be authoritative for the purpose of this case, without giving it our sanction, looking at the facts disclosed by the evidence, that the mortgagee was in the county seat with free access to the recorder's office the day before he filed it for record, and having this opportunity to record it not only failed to avail himself of it, but took it home with him, believing that it was not necessary to record it, plaintiff can take no benefit from the above principle. A mortgagee who had both the time and opportunity to file his mortgage for record and postpones doing so to a future time, can not be said to have filed the same within a reasonable time, and the court committed error in instructing the jury that the mortgage in question was recorded in a reasonable time, and in refusing an instruction asked by the defendant to the effect that, under the evidence, the mortgage was not recorded in a reasonable time. The instructions given by the court as to the validity of the mortgage, as against defendant, not being in harmony with the principle enunciated in the above cited cases, should have been refused, and those asked by defendant upon the validity of the mortgage as to defendant should have been given.

Judgment reversed and cause remanded.

All concur, except RAY, J., absent.

GIFT—UNDUE INFLUENCE — CONFIDENTIAL RELATIONS—MEDICAL MAN.

MITCHELL v. HOMFRAY.

English Court of Appeal.

In an action brought by the executors of Mrs. G. to recover a sum of 800*l.* alleged by the defendant to have been given by Mrs. G to him, it was admitted that at the time the gift was made the defendant was acting as Mrs. G's medical adviser, and that she had no independent advice of any kind. The jury found that the advance of 800*l.* was not a loan but a gift; that there was no undue influence on the defendant's part; that the relation of patient and medical man had come to an end more than three years before Mrs. G's death, and that after that relationship had come to an end, and any effect produced by it had been removed, she intentionally abode by what she had done: *Held*, that the gift was not void but voidable; and as Mrs. G must be taken upon the findings of the jury to have known that it was voidable and not to have avoided it, the defendant was entitled to judgment.

This was an action brought by the executors of the will of a Mrs. Geldard to recover a sum of 800*l.* from the defendant. The case was first tried at Durham Sumner Assizes, 1879, before Stephen, J., and a special jury. A verdict was then given for the defendant, and the Exchequer Division subsequently discharged a rule *nisi* for a new trial obtained by the plaintiff. On appeal, the Court of Appeal at Westminster set aside the verdict, and ordered a new trial. The case was tried a second time before Stephen, J., and a special jury at the Leeds Summer Assizes of 1880, when the following facts were proved: In the year 1871 Mrs. Geldard, according to the defendant's evidence, gave the defendant two checks for 500*l.* add 300*l.* for the purpose of buying a house for himself. Mrs. Geldard was at this time living at Gainford, and the defendant was, and had for some time been, her medical man. The gift, according to the defendant's evidence, was made in accordance with the wish of Mrs. Geldard's husband, who had died some time previously, and whom the defendant had also attended for a long period as medical man. The defendant's evidence further was, that he volunteered to pay Mrs. Geldard a life annuity of 40*l.*, and that he did so from the time of the gift to himself until her decease. Mrs. Geldard, on several occasions, signing receipts drawn up by the defendant in the following form: "Received from Dr. Homfray the sum of 20*l.* for half-year's annuity in consideration of a free gift of 800*l.*" In 1872 Mrs. Geldard left Gainford and went to reside at Barnard Castle, about eight miles distant, and the defendant then ceased to act as her medical man. She lived at Barnard Castle till her death in July, 1876. It was admitted at the trial that Mrs. Geldard had no independent advice of any kind when the gift was made, and that at that time he was acting as her medical adviser.

The following questions were left to the jury by Stephen, J.: 1. Was the advance of 800*l.* a loan,

or was it a gift? Answer. A gift. 2. If there was a gift, was there undue influence in fact? Answer. No. 3. Did the relation of patient and medical man between Mrs. Geldard and Dr. Homfray come to an end when she went to Barnard Castle in 1872, and did Mrs. Geldard, after that relationship had been ended, and after any effect produced by it had been removed, intentionally abide by what she had done? Answer. Yes. 4. Was the signature of the receipts obtained from Mrs. Geldard by fraud? Answer. No.

On these findings Stephen, J., directed judgment to be entered for the defendant.

The plaintiffs now appealed.

Digby Seymour, Q. C., and *Chadwyck Healey* (*Forbes*, Q. C., with them) for the plaintiffs. The *onus* was upon the defendant to show that the deceased lady had independent advice, but he admits that she had none. Upon that admission, judgment should have been entered for the plaintiffs. At all events, the jury should have been asked whether she knew that the gift was revocable. They have only found that she did abide by it; but that may have been because she did not know that she had the power to do otherwise. They cited: Rhodes v. Bate, 13 L. T. R. (N. S.) 778; L. R., 1 Ch. App. 252; Dent v. Bennett, 4 Myl. & C. 269; Anderson v. Ebsworth, 3 Giff. 154; Stump v. Gaby, 2 DeG. M. & G. 623.

A. Wills, Q. C. (*Candy* with him) for the defendant. Upon the findings of the jury, especially the third, I submit that I am entitled to keep this judgment. In Gregory v. Gregory (Coop. Ch. Cas. 204), Sir William Grant says: "In all the cases in which length of time has not been allowed to operate against the title to relief, it has been shown that there has been a continuance of the circumstances under which the transaction first took place, as of the distress of the parties, or of the improper influence used, or of some other circumstance." The main question seems to be, whether it is necessary affirmatively to show that the giver confirmed the gift after the relationship of patient and medical man had come to an end, and with the knowledge that the gift was impeachable. It is submitted that no positive act of confirmation is necessary. Nothing but acquiescence is necessary to validate the transaction. Knowledge that the gift was impeachable is to be presumed. A contract made by an infant before the Infants' Relief Act is analogous. In what such case was evidence ever given that the infant knew that the transaction was voidable? The principle is stated in 1 Taylor on Evidence, 7th ed., p. 97: "For the purpose of determining the legal rights and liabilities of parties, the courts conclusively presume what, in a vast number of cases, must of course be contrary to the fact, that every sane person, above the age of fourteen, is acquainted with the criminal as well as the civil, the common as well as the statute, law of the land; and the maxim, *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is uniformly recognized in this country, as it formerly was in ancient Rome." [SELBORNE, L. C.—It may be that it is not a positive rule of law that there must be independent advice, but that practically the gift can not be shown to be good in any other way.] It was understood, when the matter was before the Lords Justices on a former occasion, that an answer such as has been given to any one of the last three questions would be sufficient to decide the case in favor of the defendant. The true principle, it is submitted, is, that this is a question of fact; and if so, the jury have found that this was a gift, and that after the relationship had come to an end, the lady intentionally abode by what she had done. He cited: Wright v. Vanderplank, 8 DeG. M. & G. 123; *Re* The Constantinople and Alexandria Hotel Company; *Re* Ebbett's Case, L. R. 5 Ch. App. 302; 22 L. T. R. (N.S.) 494; Billage v. Southee, 9 Hare, 534; Holman v. Loynes, 18 Jur. 839; 4 DeG. M. & G. 270; *Re* Holmes' Estate, 3 Giff. 339; Archer v. Hudson, 7 Beav. 554; Pratt v. Barker, 1 Sim. 1; On appeal, 4 Russ. 507; Gibson v. Russell, 2 You. & Coll. (N. C.) 104; Cooke v. Lamotte, 15 Beav. 234; Gibson v. Jeyes, 6 Ves. 266.

E. Chadwyck Healey in reply. A knowledge of the rules of equity can not be presumed. He cited: Moxon v. Payne, L. R. 8 Ch. App. 88; Strange v. Fooks, 4 Giff. 408.

The LORD CHANCELLOR.—This cause has been argued very fully; but I myself should have been better satisfied to have dealt with both facts and law upon this hearing. It seems to me that a case of this nature, to be dealt with in a satisfactory manner, ought to present the whole of the facts for the court to form their opinion upon. But, unfortunately, this case was tried by a jury, and it comes before us in the only form in which a case that has been tried by a jury can come before us; that is to say, we can not look behind the findings of that tribunal. That is a very embarrassing state of things, when we have to decide as to the application of an important principle of equity. I understand that when this case was before the Court of Appeal on a former occasion, Bramwell, L. J., strongly advised the parties not to go before a jury. However, the course that he recommended has not been taken. The case has been twice tried, and it would be a misfortune if we had to send the case to another jury. Before determining what the findings of the jury amount to, it is important to remember how the case came before the jury. This court, when the case came before it on a former occasion, had directed a new trial, and thrown out that the questions for the jury were: [Reads the questions put at the trial with the addition of one as to independent advice at the time of the gift.] Now, what took place at the trial was this. The point as to the independent advice was covered by the admission that Mrs. Geldard had no independent advice of any kind when the gift was made. That admission seems to have been intended to cover both the time of the gift and afterwards. The other questions were left substantially as had been suggested by the court;

and at the trial neither side asked that any othre question should be left. We have been pressed now with the argument that another question should have been left, namely, whether this lady was aware that the gift was impeachable? Now, it seems to me, that if it was going to be contended that the findings of the jury were useless unless that question was asked, the question ought to have been suggested to the judge at the trial. As it was not, we must consider that the parties intended to give the go-by to that question. So interpreted, the finding of the jury as to Mrs. Geldard intentionally abiding by what she had done. after the relationship of medical man and patient had ended, becomes of vital importance. I should have preferred an answer of the jury to the question as to her knowledge that the gift was impeachable. But I assume that there was no evidence of absence of knowledge on her part. The finding of the jury is that the relationship of patient and medical man between Mrs. Geldard and Dr. Homfray came to an end when she went to Barnard Castle in 1872, and that, after that and after any effect produced by that relationship had been removed, she intentionally abode by what she had done. I think that that must be taken to mean that, even if she had known that the gift was impeachable, she would still have adhered to it. There is not here a case of express confirmation of the gift nor of simple acquiescence in it. But the gift being voidable and not void, and this lady being the person to determine whether it should be avoided or not, she determined not to avoid it. Now, although it is true that she had no independent advice when the gift was made, I think that no authority goes the length of saying that another person after her death may do that which she determined not to do. The case of Rhodes v. Bate, L. R. 1 Ch. App. 252, though it goes further than any other, laying down that wherever there is a confidential relationship the beneficiary must show not only that there was no impropriety in the gift, but that the donor had independent advice, does not go on to say that that is necessary if there is a deliberate intention to abide by the transaction after the influence has ceased, and any effect produced by the relationship has been entirely removed. There is not much authority to assist us in arriving at our decision, which is in favor of not disturbing this judgment; but there is some. The case of Dent. v. Bennett, 4 Myl. & C. 269, was a case where the gift was set aside; but I find this passage in the judgment of the Lord Chancellor (Cottenham) at p. 275: "There is an absence of all evidence of the testator having at any time recognized, or in any manner given any proof of approval of the agreement, or of any consciousness of its existence." That does not go far to show what the effects of such evidence would be; but at least it shows that it would have been a very material element in arriving at a decision in that case. In the case of Wright v. Vanderplank (8 De G. M. & G. 183), Turner, L. J., who delivered the judgment in Rhodes v. Bate (L. Rep. 1 Ch. App. 252), says, at p. 146: "A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way." I do not lay much stress on that; but I know of no reason for supposing that the law on this point, as between doctor and patient, differs from that as between parent and child. The lord justice continues: "When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate, unbiased intention on the part of the child to give it to the parent. Applyin these considerations to the present case, it is difficult to say that the present action could have been maintained if the case had rested upon the mere circumstances which attended the original gi t. I think that it could not. I am satisfied that the court would be departing from established principles in upholding it. The transaction had its inception at a period when the minority had just terminated. It was completed while the parental influence and authority was in full force, and there was no independent advice given to the daughter. The transaction, therefore, was impeachable at and after its completion; and the only question is, whether it has become unimpeachable by reason of what has subsequently occurred. It has been argued at the bar that it has not; for that some positive act was required to make it so, and here no such act has been done. I am not of opinion that a positive act is necessary to render the transaction unimpeachable. All that is required is proof of a fixed, deliberate and unbiased determination that the transaction should not be impeached. This may be proved either by the lapse of time during which the transaction has been allowed to stand, or by other circumstances. Here I have no doubt that there was a fixed, deliberate and unbiased determination on the part of the lady that the transaction should not be impeached." No doubt the fact of the subsequent marriage of the lady who was the donor in that case, and, indeed, the whole of her life, was consistent with that judgment. The lord justice continues: "It is stated on the face of the bill that the daughter had been informed by some of her friends before her marriage that a fraud had been practiced on her by the defendant. Now she was plainly a woman of strong understanding, and capable of transacting business, and it is impossible to suppose that she, having been told that a fraud had been practiced on her, should not have been aware that the courts could relieve her. And if it were possible to suppose this, the facts of the case exclude the supposition." Therefore, it must be taken that in that case the donor knew as a fact that the

transaction was impeachable. At the same time, that case is very near this one, if we may treat this case as if there had been a finding of the jury that the donor was indifferent whether she could set aside the gift or not, so that whether she knew or not would be immaterial. In *Re* Holmes' Estate, Woodward v. Humpage, Bevan's Case (3 Giff. Ch. Rep. 345, 6), Sir John Stuart, V. C., says: "The law of this court as to gifts by a client to his solicitor, I think, is perfectly established. The principle is, that the relation of solicitor and client is one of such high confidence on the part of the client, that the solicitor is considered to have an amount of influence over the mind and action of his client, which, in the eye of this court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift; but the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client. That relation is only looked at as creating the influence; and, as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if the influence of that relation is removed, there is no incapacity on the part of the solicitor to become the object of his client's bounty, and to be the recipient from his client of a gift which will be valid at law and in equity." There the vice-chancellor supposes the relationship of solicitor and client to be still subsisting, but the influence of that relationship to be at an end. Here not only have the jury found that after the influence of the relationship of doctor and patient had come to an end the patient intentionally abode by her gift, but that she did so after the relationship itself had, in fact, ceased. I think that the principles laid down in the cases that I have cited justify us in affirming this judgment.

BAGGALLAY, L. J.—I am of the same opinion. I think that the case must be decided on the facts found by the jury. Their first finding was that the advance of the 800*l.* was a gift, and not a loan. I quite agree with that finding. Their second finding was that there was no undue influence. That finding seems to me to be immaterial. Turner, L. J., in Rhodes v. Bate (L. Rep. 1 Ch. App. 257), says: "I take it to be a well-established principle of this court, that persons standing in a confidential relation towards others can not entitle themselves to hold benefits which those others have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle." Repeated decisions have settled that the relation of a medical man towards his patient is confidential. Therefore, the gift in this case being from a patient to her medical man, and without any independent advice, was originally either void or voidable. But then the jury have found that the relation of medical man and patient ceased when Jane Geldard went to Barnard Castle in 1872, and that after that relation had ceased, and any effect produced by it had ceased, she intentionally abode by what she had done. That gets rid of a second principle laid down in Rhodes v. Bate (*ubi sup.*), that where a confidential relation has once existed, the court will presume its continuance unless some positive act or some complete case of abandonment is shown. Here the jury find that the confidential relation had ceased for more than three years before Mrs. Geldard's death. Then they find that she, during that period, "intentionally adode by what she had done." Now, no doubt we have to take that finding with the admission that Mrs. Geldard had no independent advice at any time. But the finding of the jury contains the word "intentionally." That must be taken to mean that she knew what she had done, that she approved of what she had done, and that she determined to abide by it. It was an adoption of what she had done, after the confidential relation had ceased for three years, sufficient to take it out of the cases where gifts have been invalidated on the ground of confidential relationship coupled with absence of independent advice.

BRAMWELL, L. J.—I am of the same opinion Appeal dismissed.

MASTER AND SERVANT — INJURIES BY NEGLIGENCE — UNREASONABLE REGULATION.

PITTSBURGH, ETC. R. CO. v. HENDERSON.

Supreme Court of Ohio, February 28, 1882.

An injury to a servant, himself without fault, in consequence of an unreasonable regulation of the superintendent, appointed by the master and clothed with power to make and suspend rules, is not an injury at the hands of a fellow-servant in such a sense as to bar his action.

Error to the District Court of Harrison County.

Henderson brought suit in the Court of Common Pleas of Harrison County against the Pittsburgh, Cincinnati & St. Louis Railway Company. He was a laborer in the employ of the company upon a construction train which was on the main track of the railroad, in a deep rock cut, upon a heavy curve in the road. While he and the other laborers were at work loading the train with gravel, a freight train, which was on its regular time, was run into the construction train without warning of any sort, and by the wreck which resulted from the collision, Henderson was driven against the rocks, two or three of his ribs were broken, his shoulder was dislocated, and he was

permanently injured. The action was brought to recover damages for the injuries, and in the court of common pleas there was a verdict and judgment in his favor for $3,000, which judgment was affirmed in the district court, and this petition in error was filed to reverse the original judgment as well as the judgment of affirmance. The record contains all the evidence.

Construction trains have no place on the schedule or time-table, and, by the printed rules of the company, it is required that they shall be kept out of the way of all regular trains, freight as well as passenger, clearing their time at least ten minutes, and it is the duty of the conductor of the construction train to observe the time of all trains and obey the rule. This rule, however, may be suspended as to freight trains by special order of the superintendent of the railroad company, whenever he sees fit to do so, in which case it is the duty of the conductor of the construction train, where such train is being loaded on the main track, to keep the train in its place and send a man with a proper signal to notify approaching freight trains.

In this instance the superintendent had made such special order, and the conductor of the construction train, keeping his train on the track, had sent a flagman to notify the approaching freight train; but the flagman performed his duty so negligently and improperly that the engineer of the freight train understood his acts as an order to go ahead and not stop. The engineer says the flagman stood several yards from the railroad track, holding the flag down at his side with one hand and making motion with the other as for a forward movement. In this way the injury was occasioned, without any negligence on the part of the plaintiff. It would have taken six minutes to move the construction train to a side track from the place where it stood on the main track.

Barret was superintendent of the company. He testified: "There are general printed rules for all trains, made in order to promote the safety of persons and property. I establish these printed rules. I am the superior officer for that purpose on this division. I give special orders and private instructions, as I think necessary, to annul or disregard the general rules. * * * * They are not printed. * * * * Construction trains can not occupy the main track without special instructions. It is the duty of the conductors of construction trains to protect their trains. I gave special order, which annulled the general rule as to construction trains, allowing them to stand on the track until the arrival of freight trains, by sending back a flagman to notify approaching trains. I give special orders to construction trains where to work, and direct them by special orders from time to time, by telegram or otherwise."

Lowen was boss of the laborers employed on the construction train. He hired and discharged the men and regulated the time and manner of working. He had authority to require that the train should be moved, as he might direct, with reference to the work; but it was no part of his duty to observe the time of approaching trains, that matter being confided exclusively to the conductor. He was in the caboose until the freight train was within a few feet of the construction train, and barely escaped serious injury, but several persons beside Henderson were injured.

In the amended petition the negligence of the superintendent, "boss," and the conductor of the construction train, is stated, and the answer is a denial.

OKEY, C. J., delivered the opinion of the court:

Where a servant sustains injury by the negligence of his master, the master is liable in an action by the servant for damages. A breach of duty by the master is not one of the risks which one assumes on entering upon the employment of another. This breach of duty may consist in employing other servants who are incompetent, in providing unsafe machinery and structures, in failing to notify the servant of peculiar dangers, known to himself but not to the servant, or in needlessly placing the servnnt in a place of danger.

As corporations act only through agents, it sometimes becomes important to determine what persons stand in such relation to it as that their negligence shall be deemed the negligence of the corporation, or, as sometimes expressed, who is to be regarded as merely a servant of the corporation, and who is, in legal effect, master. Upon this subject the cases are by no means in harmony (Pierce on Railways (ed. of 1881), 367; 2 Thompson on Neg., ch. XX.; 11 Reporter, 42, 207, 591; 21 Am. L. Reg. 76); but it is unnecessary to enter upon any examination of them. No doubt can be entertained that one standing in the relation to the company sustained by Barrett, being the superintendent of the company, and clothed with power, at his own direction, to make and suspend rules to regulate the running of all the trains on the road, is to be regarded, in a case of this sort, as in legal effect. And when one, so in legal effect master, makes a special order with respect to the management of a particular train, which is, under the circumstances, unreasonable, and by the execution of such order a servant of the company, himself without fault, is injured, it will be no answer to the action of the injured party against the corporation to say that the immediate cause of the injury was the negligence of a "fellow-servant" of such injured party in the execution of the unreasonable order. Chicago, etc. R. Co. v. McLallen, 84 Ill. 109; Chicago, etc. R. Co. v. Moranda, 93 Ill. 382; Hough v. R. Co., 100 U. S. 213; Fuller v. Jewett, 80 N. Y. 46; Smith v. Oxford Iron Co., 42 N. J. L. 467; Ohio, etc. R. Co. v. Collam, 73 Ind. 261; Pattimon v. Pittsburgh, etc. R. Co., 76 Pa. St. 389; Cumberland, etc. R. Co. v. State, 44 Md. 283; Ford v. Fitchburg, etc. R. Co., 110 Mass. 240; Berea Stone Co. v. Kraft, 31 Ohio St. 287;

Lake Shore, etc. R. Co. v. Lavalley, 36 Ohio St. 221.

Whether a rule of a railroad company is or is not a reasonable rule, is in many cases a question of law; but in this case it can not be affirmed as matter of law that the special order made by Superintendent Barrett was reasonable. On the contrary, whether such order was reasonable or unreasonable, was a question of mixed law and fact proper for the determination of the jury, in view of the circumstances under which the order was to be executed, and upon proper instructions as to the law. The jury found that the order was unreasonable, under the circumstances, and we are not prepared to say that the finding was wrong. Objection is made that the court permitted the petition to be amended after the evidence was closed, and also permited the jury, after the verdict was announced, to retire for the purpose of correcting it. But these matters rested in the discretion of the court, which seems to have been exercised in furtherance of justice. And as to the request to charge, and the charge given to the jury, the exception was general and not specific, and, looking to the whole record, we can not say the action of the court was so prejudicial to the company in any respect, as to afford ground of reversal.

Judgment affirmed.

WEEKLY DIGEST OF RECENT CASES.

ASSIGNMENT—NON-NEGOTIABLE PAPER.

The assignee of non-negotiable paper succeeds only to the rights of the assignor, and is affected by all the defenses against him at the date of assignment or before notice thereof. *Havens v. Potts*, S. C. N. C.

CONSTITUTIONAL LAW—CLAIMS AGAINST THE STATE—DAMAGES.

1. The State is not answerable in damages to an individual for an injury resulting from the alleged misconduct or negligence of its officers or agents. 2. The original jurisdiction conferred upon this court by article 4, section 9 of the Constitution, "to hear claims against the State," is confined to such as are legal, and could be enforced if the State, like one of its citizens, was amenable to process. *Clodfelter v. State*, S. C. N. C.

CONSTITUTIONAL LAW—REPUGNANCE TO THE CONSTITUTION MUST BE PLAIN.

To justify a court in pronouncing an act of the legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition of the Constitution clearly expressed or necessarily implied. Where the constitutionality of an act of the legislature depends on the construction of a word, any meaning of that word, whether technical or popular, which will sustain the constitutionality of the act, will be adopted. *Commonwealth v. Butler*, S. C. Pa., February 2, 1882.

CONTEMPT—WHAT AMOUNTS TO.

In a proceeding for contempt the judge finds the facts, and if it be ascertained that a judicial mandate is wilfully and intentionally disregarded, the penalty is incurred, whether an indignity to the court or contempt for its authority was or was not the motive. In this case the defendant is held guilty of contempt in disobeying an order restraining him from carrying on the business which with his good-will he sold to the plaintiff under an agreement to discontinue it himself. *Baker v. Gordon*, S. C. N. C.

CONTRACT—CONSIDERATION.

An agreement not to make application for, and be discharged from a debt of bankruptcy, is a sufficient consideration to support a contract to take less than what may be due on a debt. It is a new and valuable consideration for the reduction of the original debt. *Dawson v. Beall*, S. C. Ga., March 14, 1882.

CONVEYANCE—BETWEEN HUSBAND AND WIFE—CONSIDERATION.

1. By the laws of Iowa a conveyance of lands, executed by either a husband or wife directly to or in favor of the other, is valid at law to the same extent as between other persons. 2. Such conveyance of lands in that State from the wife to the husband, both residing there, is a good consideration for the conveyance of lands of equal value in this State from such husband to such wife, and such conveyance vests in the wife a good title in equity, which, in the absence of fraud, can not be impeached by existing creditors of the husband. *Mehlhof v. Pettibone*, S. C. Wis., February 6, 1882.

CORPORATION—ULTRA VIRES—BORROWING MONEY.

A private or trading corporation has power to borrow money and issue its notes, bonds or other evidences of indebtedness, unless restrained by its charter or the law of the land. *Philadelphia, etc. R. Co.'s Appeal*, S. C. Pa., March 6, 1882.

CRIMINAL LAW—MURDER—MANSLAUGHTER.

Where the evidence tends to show that the killing was done by the use of means not in their nature calculated to produce death, and that the defendant was not actuated by an intention to kill or by an evil or cruel disposition, then the killing could not be murder, and the offense might be reduced to any grade of assault and battery, and the court should charge upon this phase of the case. *Hill v State*, Tex. Ct. App., March 1, 1882.

CRIMINAL LAW—PLEADING—FORGERY—SETTING OUT FORGED INSTRUMENT.

Indictment for forging and altering a promissory note. It is well settled that in prosecutions for forgery the instrument charged to be forged must be set out in the indictment according to its tenor, so that the court may be able to judge whether the instrument is one concerning which the crime of forgery may be committed. But when the instrument has been lost or destroyed, or is in the possession of the defendant, the substance of it need only be set out. *Munson v. State*, S. C. Ind., March 16, 1882.

CRIMINAL LAW—PLEADING—SLANDER.

An indictment under the act of 1879, chap. 156, for slandering an innocent woman, must contain the averment that the woman is innocent. *State v. Aldridge*, S. C. N. C.

CRIMINAL LAW—RAPE—WEIGHT OF EVIDENCE.

Though the testimony of the person on whom the outrage was attempted was that it was actually committed, yet as her testimony was sought to be

impeached, as she was only eleven years of age, and as at the time of the outrage she was under the influence of liquor which had been forced down her throat, the jury were authorized to disregard her testimony and find the accused guilty of assault with intent to commit rape, there being ample evidence of such assault. *Jones v. State*, S. C. Ga., March 14, 1882.

DAMAGES—DETENTION OF CERTIFICATE OF DEPOSIT.

The defendants unlawfully detained a certificate of deposit of the value of $2,000 from the plaintiff. *Held*, that the plaintiff was entitled to recover damages for such detention equal to legal interest on the value of the certificate from the date of the demand therefor and refusal to the recovery—and this without any evidence that the plaintiff would have converted said certificate into money and put it to use, other than his right to do so and the defendants' illegal prevention of the exercise of such right. *Sleppy v. Bank of Commerce*, U. S. C. C., D. of Oregon, February 22, 1882.

DIVORCE—ALIMONY—QUANTUM.

Appellant obtained a divorce and $100 alimony, and claims that she ought to have had more. It appears from the evidence that, besides a comfortable support she received in all about $250 for her fourteen months' residence with the defendant, and, as she refused to grant him his conjugal rights, the court is of the opinion that the amount was sufficient. *Tumbleson v. Tumbleson*, S. C. Ind., March 17, 882.

EVIDENCE — CRIMINAL LAW — ACCOMPLICE — CONFESSION.

1. During the pendency of the wrongful act, not only in its perpetration, but in the effort at concealment, the act and conduct of one accomplice is admissible against the other, as are also his sayings pending the common criminal enterprise. 2. A confession of an employee induced by a promise from an employer that, if the stolen goods were delivered by the employee, who was charged with the theft, there was a probability that the whole matter could be compromised and settled, should not have been admitted. *Bird v. State*, S. C. Ga., March 14, 1882.

EVIDENCE—EXAMINATION OF WITNESS—LEADING QUESTIONS.

The fact that a State's witness is related to one of the defendants, is no good and sufficient ground to authorize leading questions by the State's attorney, when the witness shows no disposition to evade or answer in doubtful or double sense, but answers frankly, plainly and pertinently, each question propounded. *Conn v. State*, Tex. Ct. App., February 18, 1882.

EVIDENCE—IMPEACHMENT OF WITNESS.

It is not necessary that the impeaching testimony should be absolute and positive as to the bad character of the witness sought to be impeached. The impeaching witness may swear that the character of the attacked witness has been bad, but is better for a year past, and that he knows it from what it is generally believed to be; may say whether or not he would believe him, and to what extent he would believe him. Such testimony may go to the jury, to be weighed by them, under a proper charge from the court. *Sims v. State*, S. C. Ga., March 14, 1882.

HOMESTEAD—APPLICATION FOR—NECESSARY ALLEGATIONS.

Where the husband and father applies for a homestead, the presumption is that the application is for the homestead to be carved out of his own property, and the homestead is not invalid because the petition does not state out of whose property it is to be taken. The presumption is trengthened in this case by an allegation in the petition that the homestead is sought (fully described) "where he resides." *McWilliams v. McWilliams*, S. C. Ga., March 14, 1882.

HOMESTEAD—LIMITATIONS—PERSONS UNDER DISABILITIES.

By the act of February 15th, 1876, it was provided that suits for the recovery of homestead illegally sold prior to said date should be brought within six months after the passage of said act. It has been held by this court that no exception could be made under such act in favor of minors and married women, so as to allow them six months after the removal of their disabilities within which to sue. Pittman v. Matthews, February term, 1881. Neither will an allegation of fraud in the sale, and filing of bill in equity within six months after the discovery of such fraud, avail to defeat the bar imposed by the statutes. *Rowan v. McCurry*, S. C. Ga., March 14, 1882.

JUDGMENT—CONCLUSIVENESS—RES ADJUDICATA—IDENTITY OF ACTION.

The applicability of the plea of *res adjudicata* depends upon the identity of the cause of action or matters of defense in issue, and not the identity or similarity of the grounds or points urged to support or maintain the action or matter of defense; and all the matters determined by the court are as fully concluded by the judgment as those considered and discussed, if the matter put in issue has been determined by the court upon the merits. *Frankel v. Heidenheimer*, Tex. Ct. App., February 15, 1882.

JURY TRIAL—POLLING THE JURY—INFORMALITY.

When a demand was made to poll the jury, and by inadvertence the name of one of the jurors was not called, and the jury was discharged for the term, it was not such error on the part of the judge as to cause the grant of a new trial, that he had the juror recalled and polled, before he had left the court room or the presence of the judge. This is especially true, as it was not shown that such juror had mingled or conversed with bystanders, and as the evidence amply sustains the verdict. *Russell v. State*, S. C. Ga., March 14, 1882.

JURY TRIAL—MISCONDUCT OF JURY—OF BAILIFF.

1. Entrance by the sheriff into the lodging room of a jury, charged with a criminal case, for the purpose of seeing that they are properly provided for and guarded from outside influence, is not good ground for a new trial. Intimate association by the sheriff with any of the jury, such as occupying the same bed, is reprehensible and improper, and would void a finding, if the affidavits of the sheriff and jury did not relieve his conduct from all suspicion of wrong to the State or the defendant. 2. While it is true that misconduct on the part of the jury, while they have the case under consideration, from which injury might have resulted to the defendant, throws the burden on the State to show that no such injury resulted, yet we are satisfied that no harm was done to defendant by the impropriety complained of in this case. Though it appears that spirituous liquors were used by some of the jury during the trial, yet it is shown by the affidavits of the jurors who used the liquor, and of other jurors, that it was used in extreme moderation, and that no juror was under the in

fluence of the same to the extent of impairing or affecting his capacity as a juror. *Jones v. State*, S. C. Ga., March 14, 1882.

NEGLIGENCE—MUNICIPAL CORPORATION—LIABILITY OVER—PLEADING.

Appellee's complaint avers, in substance, that appellant constructed and maintained upon the sidewalk of said city, an iron picket fence, along an excavation which defendant had dug, etc., without the license of the city; that one Kersey, in the night time, fell upon said fence and received injuries, for which he sued the city and recovered damages. The complaint is bad for failure to aver that the defendant had notice of the action of Kersey against the city, and an opportunity of defending it. 2 Dillon on Mun. Corp., sec. 1,035. In such case the complaint should at least show such a state of facts as would have made the defendant liable to Kersey, had the latter brought his action against the defendant instead of the city. The complaint does not allege that Kersey was free from negligence contributing to his injuries. The complaint was insufficient. *Catterlin v. Frankfort*, S. C. Ind., March 16, 1882.

NEGOTIABLE PAPER—NOTE OF CORPORATION.

Suit on the following instrument: "On the first day of September next after date, the Howard County Agricultural Association, who executes this note by her directors and the other obligors, whose names are hereto attached as sureties, do promise to pay," etc. Signed, T. M. Kirkpatrick, A. L. Sharp, secretary; Samuel F. Buther, and ten others, directors of the Howard County Agricultural Association. *Held*, that this was the note of the association and not of the individuals whose names are signed to it. *Armstrong v. Kirkpatrick*, S. C. Ind., March 16, 1882.

PARTNERSHIP—ESTOPPEL FROM DENYING PARTNERSHIP LIABILITY.

When the defendants, who are sued as partners for the purchase of certain property suitable to their business, received an account on bill of it charged to the firm, and never returned or objected to it to the plaintiffs, and about and before the time of the purchase made purchases of meats and goods, and had the horses, which constituted a part of the purchase, shod in the name of the firm and paid for the same, and otherwise held themselves out as partners, they are estopped from denying their partnership liability. *Jenkins v. Crane*, S. C. Wis., February 7, 1882.

PARTNERSHIP—LIABILITY FOR TIMBER, UNLAWFULLY CUT, PURCHASED BY FIRM.

If one of two partners, without the knowledge of the other, purchases lumber, timber or staves manufactured out of timber unlawfully cut upon the plaintiff's land, with notice of the fact that the timber was so unlawfully cut upon his land, and the partnership pays for the articles so purchased, and sells the same and receives the proceeds of such sale, they are both liable to have damages assessed against them under the provisions of sec. 4269, Revised Statutes of 1878. *Tucker v. Cole*, S. C. Wis., February 6, 1882.

PRACTICE—SETTING ASIDE JUDGMENT—EXCUSABLE NEGLIGENCE.

On motion to set aside a judgment on the ground of excusable negligence, it appeared that the judgment was rendered by default in 1875, six months after return of summons; defendant did not employ counsel to attend to the case, but relied upon the assurances of another to do so; no defense was made to the action by reason of the attorneys mistaking the case, and no further attention was given to the matter until a year after judgment and eighteen months after the attorney was spoken to. *Held*, that the neglect was inexcusable. *Norwood v. King*, S. C. N. C.

RECEIVER—BREACH OF BOND—SUIT ON.

A receiver and his surety can not be sued upon the bond for an alleged breach of his trust before a default is ascertained, the proper practice being to apply to the court for a rule on the receiver to render his account. *Bank of Washington v. Creditors*, S. C. N. C.

RECORD—LIABILITY OF RECORDER IN DAMAGES—DEFECTIVE SEARCH.

In an action against the recorder of deeds for damages to a lender of money on mortgage, by reason of the omission, from the certificates of search, of certain prior mortgages upon the premises, where the searches had been ordered by the borrower of the money, it was *held*, that it was a question of fact for the jury, in this case, whether the borrower, in procuring the searches, was acting for himself or as agent of the lender. *Peabody Building Association v. Houseman*, S. C. Pa., January 23, 1882.

SUBROGATION—COMMON DEBTOR.

The doctrine of equitable subrogation does not apply except in cases where both funds are in the hands of the common debtor of both the creditors. *Conser's Appeal*, S. C. Pa., October 3, 1881.

USURY—PAYMENT UPON CONTINGENCY.

Where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious. *Philadelphia, etc. R. Co.'s Appeal*, S. C. Pa., March 6, 1882.

QUERIES AND ANSWERS.

[**** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

26. Certain towns in Maine voted to pay to each drafted man $300 to go himself, furnish a substitute or pay his commutation. A having been drafted and accepted by the United States Surgeon, paid his commutation fee of $300, and the selectmen, under said vote, gave him an order accepted by the treasurer for said amount. A statute was subsequently passed legalizing all the votes and doings of towns in this behalf. A brought suit against the town on his order, and the court decided that this act of the legislature was unconstitutional and void, and that the town had no legal right to pay, or raise money to pay, commutations to drafted men who did not enter the service; and A became nonsuited. Subsequently this order, with others of same nature, came into the hands of a citizen of Massachusetts by indorsement, who brought a suit thereon in the United States Circuit Court. After this last suit was brought, the town, at a legal meeting, under appropriate articles, voted to settle

this last suit by paying a sum equal to the amount of the orders in suit, provided the plaintiff would not enter his action, and would pay all costs in said suit already incurred. He thereupon notified the town that he accepted their proposition, did not enter his action in court, and relieved the town from all costs. The officers of the town refuse to carry out this vote after a full performance on the part of the plaintiff of all the conditions thereby imposed on him. Is the town liable under this last vote? C.

Portland, Me.

QUERIES ANSWERED.

Query 19. [14 Cent. L. J. 197.] A made a deed in usual form, except the *habendum*, conveying land to B. The *habendum* was as follows: "To have and to hold to said A for his natural life, remainder at his death to C in fee simple. In case C dies without issue, then the said land is to vest in D." C was living when the deed was made, but died before B. Query. What did C take and what did D take? Cite authorities. D.

Springfield, Ill.

Answer. The query, it seems to me, is faulty in that it does not inform us whether or not the *habendum* clause is repugnant to the grant. The deed, it is said, is made in "in the usual form." The "usual form" of a grant is to "B, his heirs and assigns." If this is the form of the grant in the case submitted, then the *habendum* clause is void as being contradictory to the grant. Washburn on Real Property, Book V. p. *644. But on the supposition that the grant is such that the *habendum* clause can be reconciled with it, I suppose that the querist means that we are to read B where A occurs in the *habendum*, and also that C died without issue. C then acquired a vested remainder by the deed from A. Although he might not, and in fact did not, live to enjoy his estate, yet, at the time of the making of the deed by A, he had "a present fixed right of future enjoyment." Washburn on Real Property, Book II. p. *228. But his right was liable to be defeated by his dying without issue. That contingency having occurred, D's remainder, which before had been contingent, at once became vested and was substituted for that of C. Washburn on Real Property, Book II. p. *250. R. WOLCOTT.

Springfield, Ills.

Query 22. [14 Cent. L. J. 198.] A mortgage of real estate in Iowa is foreclosed by proceedings in equity, and the mortgaged premises are sold on execution issued on the judgment of foreclosure. At the expiration of the year of redemption the purchaser takes a sheriff's deed of the lands. During the pendency of the foreclosure proceedings, after the filing of the petition, but before decree, a creditor of the mortgagor obtains a judgment, which becomes a lien on the mortgaged premises. The judgment creditor now insists that as he was not a party defendant to the foreclosure proceedings, his right of redemption is not affected thereby, and that he can redeem from the sale under the mortgage. Can he do so? Please cite authorities. P.

New Hampton, Iowa.

Answer. A mortgagor has an equity of redemption until the sale upon foreclosure. After sale he has the right of redemption if the statute gives it, and so has the lien-holder. Mayer v. Farmers' Bank, 44 Iowa, 216. In this case, the creditor being a simple judgment-lien holder, he could have redeemed from the sale upon the foreclosure within nine months. Code Iowa 1873, sec. 3103. The holder of a simple judgment-lien never had an equitable right to redeem from a senior lien-holder after the execution of a sheriff's deed made pursuant to a sale thereunder. Diddy v. Risser, 55 Iowa, 699. Can the creditor now redeem? Answer. No. R. S. B.

Adel, Iowa.

NOTES.

——The following is a *verbatim et literatim* copy of a petition recently presented to the Circuit Court in Arkansas, for leave to practice before justices of the peace:

The State of Arkansas, —— Countey to all Whom it may concurn We the under A sigen Names Do say that Joseph g herman Has got A Wright to Practice law in the Justices of the Peacess Court Without Licenes When the Person imploWing him is Willing to Resk him as an agent Either Asking questions or Pleading. Not as A laWyer But an agent and We think that He Will Be in the Limits of the Law.

We think that license should have been accorded. Anybody willing to "resk" him, should not have been deprived of the privilege of such counsel.

——Not long since an attorney brought suit for killing stock by a railroad, occasioned by failure of the railroad company to fence the road as required by law. A judgment was rendered in the justice's court for the damages proven, and the company, as usual, appealed the case to the circuit court. In the course of time, and after repeated delays, the case came up for trial in the circuit court, when the attorney who brought the suit became satisfied that under a recent decision of the Supreme Court (rendered since the trial before the justice), the petition or complaint was defective; so the aforesaid attorney proceeded to address His Honor, the circuit judge, as follows: "If your Honor please, I think I can prepare a suit for killing stock in this case. I know I brought this suit right when I commenced it before the justice. I am sure it was brought then according to the law as expounded by our august Supreme Court; but since then our highest court has rendered a decision changing the law, so I must, of necessity, dismiss this case and bring suit anew. If our Supreme Court could only keep still awhile, I am sure I can prepare a good complaint; I therefore dismiss this case in order to bring it to conform to the last decision of the Supreme Court!"—*Exchange.*